No. 89-531

IN THE

# Supreme Court of the United States

October Term, 1989

MOUNTAIN STATES TELEPHONE AND TELEGRAPH CO., d/b/a MOUNTAIN BELL, a Colorado corporation,
*Petitioner,*

v.

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO, and THE HONORABLE WILLIAM G. MEYER, one of the judges thereof,
*Respondents.*

## ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Does a trial court order requiring a class action defendant to send in its billing envelopes a constitutionally required judicial notice to potential class members, at no cost to the defendant, comport with *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986)?

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## RESPONDENTS' BRIEF IN OPPOSITION

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Respondents District Court, City and County of Denver, State of Colorado, and The Honorable William G. Meyer, one of the judges thereof ("the trial court"), respectfully request that this Court deny the petition for a writ of certiorari.

## STATEMENT OF THE CASE

In March 1982, petitioner Mountain States Telephone and Telegraph Co., d/b/a Mountain Bell ("Mountain Bell")[1] created a new competitive service for inside wire maintenance wholly apart from its regulated monopoly

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[1] Mountain Bell officially changed its operating name in June, 1987. Formerly known as Mountain Bell, it now does business under the name US West Communications.

services. Five years later, the named plaintiffs[2] filed this class action lawsuit alleging that Mountain Bell has unlawfully monopolized this market by utilizing a "negative option" or "silence as consent" contract scheme to collect monthly fees from its customers for inside wire maintenance services. Appendix to Petition for Writ of Certiorari at 2a-3a ("Pet. App."). Through this scheme, Mountain Bell immediately acquired a 98% market share and has received more than $50 million from Colorado customers since 1982. The lawsuit asserts violations of the Colorado Antitrust Act, the Colorado Consumer Protection Act, and Colorado law concerning contract formation, fraud and material misrepresentation by concealment or nondisclosure. *Id.* at 3a. No violations of federal law are asserted.[3] Mountain Bell's answer denies all liability, raises affirmative defenses and asserts a counterclaim. The plaintiffs deny the allegations of the counterclaim. *Id.* at 3a-4a.

The trial court certified the lawsuit as a class action, which could potentially involve 1.5 million customers of Mountain Bell. Once the trial court certified the class, Colo.R.Civ.P. 23(c)(2) required the court to "direct to the members of the class the best notice practicable under the circumstances," informing them of the existence of the lawsuit, the content of the claims and counterclaims, their options for participation or withdrawal, and their right to appear. Colo.R.Civ.P. 23(d) provided the trial court with

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[2] The real parties in interest are the named plaintiffs in the lawsuit pending before the respondent court. *See* Petition for Writ of Certiorari at ii. The named plaintiffs represent the class of plaintiffs which includes all persons and entities who have been customers of Mountain Bell in Colorado since the unbundling of inside wire maintenance service in 1982 and who have been charged fees for such service between that date and August 25, 1989. *See id.*

[3] Subsequently, a similar lawsuit was filed in the United States District Court for the District of New Mexico, alleging, *inter alia*, Mountain Bell's violation of federal antitrust law. *Sollenberger v. Mountain States Tel. and Tel. Co.*, No. 87-1485-SC (D.N.M.).

substantial discretion in the manner and method by which it satisfied this notice requirement. Under this rule, the trial court allocated the responsibilities for meeting the notice requirement as follows: (1) the trial court is responsible for the content of the class notice, which will be issued under its signature; (2) Mountain Bell will distribute the notice as a one-time enclosure in its monthly billing envelopes; and (3) the plaintiffs will bear the entire expense of notice production and distribution, including any costs incurred by Mountain Bell.

The dispute presently before the Court concerns the portion of the trial court's notice order which requires Mountain Bell to mail the class notice. This portion of the order was based upon the trial court's evaluation of the substantial delay, difficulty and expense that would result if the plaintiffs were required to duplicate Mountain Bell's computerized mailing records and facilities for the one-time mailing. *See* Pet. App. at 27a-31a. The task assigned to Mountain Bell, furthermore, does not differ in kind from the service it regularly provides to advertisers, who buy the "extra space" in the billing envelopes in order to reach Mountain Bell's customers. *See Sollenbarger v. Mountain States Tel. and Tel. Co.*, 121 F.R.D. 417, 437 (D.N.M. 1988).

Mountain Bell objected to the notice task assigned to it, asserting a first amendment right to be free of any association with the claims contained in the court's notice. It relied almost exclusively on *Pacific Gas & Elec. Co. v. Public Utilities Comm'n.*, 475 U.S. 1 (1986) ("*PG&E*"). The trial court ruled against Mountain Bell on the basis that the notice to potential class members does not come within the first amendment holding of *PG&E*. Pet. App. at 30a.

Mountain Bell sought interlocutory review by filing an original proceeding in the Colorado Supreme Court. That

Court also rejected Mountain Bell's first amendment claim, holding that the notice

> does no more than provide Mountain Bell customers with factually accurate information with respect to their right to join in or be excluded from pending litigation over inside wire maintenance service — a matter directly bearing on the commercial relationship between Mountain Bell and its customers — and is reasonably related to the substantial governmental interest of providing a fair and cost-effective method for resolving a multitude of claims involving common issues of fact or law in one lawsuit, thereby preventing the unnecessary waste of judicial resources in repetitious litigation.

Pet. App. at 17a.

## REASONS FOR DENYING THE WRIT

The Colorado Supreme Court's decision is completely consistent with *PG&E* and does not conflict with the decision of any court. In the only other case involving the issues presented in the petition, the district court rejected Mountain Bell's argument as a misreading of *PG&E*. *Sollenbarger v. Mountain States Tel. & Tel. Co.*, 121 F.R.D. 417 (D.N.M. 1988); Order denying Motion to Alter or Amend, reproduced in Respondents' Appendix A at A-1 to A-7 ("Resp. App.").[4] Moreover, the acceptance of Mountain Bell's argument would seriously impair the judicial process.

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[4] Mountain Bell has sought interlocutory review of the District Court order rejecting the same constitutional arguments put forth in the petition for writ of certiorari. The plaintiffs have moved to dismiss the interlocutory appeal for want of appellate jurisdiction and that motion is presently pending before the Court of Appeals for the Tenth Circuit.

## I. THIS COURT HAS LONG RECOGNIZED TRIAL COURT AUTHORITY TO ASSIGN NOTICE TASKS TO DEFENDANTS IN CLASS ACTIONS.

The trial court's order assigning a legal notice task represents nothing more than a typical exercise of its discretionary authority in managing a Rule 23(b)(3) class action. Pursuant to Colo.R.Civ. 23(d), the trial court necessarily assessed the resources and abilities of the parties in assigning the tasks required to provide the notice mandated by Colo.R.Civ.P. 23(c)(2). The notice order requires the plaintiffs to bear all costs of production and distribution, and Mountain Bell, which has the requisite computerized mailing system and facilities in place, to distribute the notice as a one-time enclosure in its monthly billing envelopes.

State and federal trial courts routinely issue similar notice orders,[5] and this Court has specifically approved the practice. In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 180 n.1 (1974) (Douglas, J., dissenting in part) the possibility of requiring a defendant to assist a trial court in disseminating its class notice was first discussed. Four years later, this Court unanimously approved the exercise of court discretion to require such action. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 355 n.22 (1978).

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[5] Several states, for example, explicitly authorize their trial courts to require that defendants send the notice to the plaintiff class. Penn.R.Civ.P. 1712(c) (1989); Oreg.R.Civ.P. 32F.(4) (1987); Calif. Civil Code § 1781(d) (1985). *See also* C.P.L.R. § 904(d)I (1978) (New York); Mich. Comp. L. § 445.911(5) (1989); Rules Governing the Courts of the State of New Jersey 4:32-2(b) (1989) (authorizing trial courts to require that defendants bear costs of notice to plaintiff class). Typical of federal court practice allowing enclosures are *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 456 (3d Cir. 1977), *cert denied*, 434 U.S. 1086 (1978); *Partain v. First Nat'l Bank of Montgomery*, 59 F.R.D. 56, 61 (M.D. Ala. 1973); *Zachary v. Chase Manhattan Bank*, 52 F.R.D. 532, 535 (S.D.N.Y. 1971); *Jacobs v. Sea-Land Serv.*, 23 F.E.P. Cas. 1179, 1182 N.D. Cal. 1980) (defendant employer attached notice form to paycheck envelopes) *See also Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 355 n.22 (1978) (listing federal cases that contemplate similar procedure).

In *Oppenheimer*, the Court cited a number of district court decisions that had "required the defendants in Rule 23(b)(3) class actions to enclose notices in their own periodic mailings in order to reduce the expense of sending the notice." 437 U.S. at 355 n.22. Indeed, the order at issue in *Oppenheimer* had allowed "the notice to class members . . . to be inserted in the envelopes of a periodic . . . mailing" of the defendant. *Id.* at 346 n.7. Thus, the very practice at issue here was recognized as an appropriate exercise of district court discretion designed to accomplish the mandatory notice with "less difficulty or expense," *id.* at 356, than would otherwise be the case.

Mountain Bell argues that court authority regarding class notice was entirely changed by *PG&E*, which, despite its explicit exception for "legal notices," 475 U.S. at 15 n.12, effectively overruled this prior line of cases and rendered unconstitutional the well established state and federal court practice. *PG&E* did no such thing.

## II. THE DECISION OF THE COLORADO SUPREME COURT IS CONSISTENT WITH PG&E.

*PG&E* involved a state regulatory commission order converting a utility's billing envelope into a public forum for political debate. The commission order required the utility to provide space in the envelope, free of charge and on a regular basis, to a third party with a political and ideological agenda opposed to that of the utility. *See PG&E*, 475 U.S. at 6. The commission made no effort to regulate the content of what was inserted in the envelope. It was enough that the message was from an opponent of the utility.

This Court struck down the order as a content-based burden on the utility's constitutionally protected freedom of expression. The commission had impermissibly chosen one speaker, based on the identity of its interests, and forced the speaker's opponent to bear the burden and cost of disseminating the speaker's message. *PG&E* was, therefore, a classic example of the state burdening one party's

speech in order to encourage and strengthen the speech of another. Such one-sided interventions in the private marketplace of public debate have long been held to be unconstitutional. *See, e.g., First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790-91 (1978); *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

Two potential consequences of the commission's order were of particular importance to the decision in *PG&E*. First, by granting access to the utility's opponents, the commission was burdening, and even penalizing, the utility's expression of opinion on noncommercial issues. This, the plurality reasoned, could easily result in a decision by the utility not to speak on controversial issues. *PG&E*, 475 U.S. at 14 (Opinion of Powell, J.). Second, because the utility was forced to associate with political or economic messages with which it disagreed, it might be compelled to alter the content of its own messages in response. The commission could not provide a private party such control over the speech agenda of another private party. *Id.* at 15-16 (Opinion of Powell, J.). *See also id.* at 23 n.2 (Marshall, J., concurring).

*PG&E* also established two specific exceptions to the general rule of utility control over the content of information mailed in its billing envelopes:

> The Commission's order is . . . readily distinguishable from orders requiring appellant to carry various legal notices . . . . The State, of course, has substantial leeway in determining appropriate information disclosure requirements for business corporations.

*Id.* at 15 n.12 (citation omitted); *see also id.* at 23 n.2 (Marshall, J., concurring). The trial court's class notice clearly comes within the "legal notice" and "appropriate information disclosure" exceptions recognized in *PG&E*.

A. The Trial Court's Class Notice Falls Within the Exceptions Recognized in PG&E.

1. The Legal Notice Exception

While Mountain Bell concedes that *PG&E* does not apply to legal notices, it argues that this exception is limited to legal notices to which a regulated utility has implicitly consented. *See* Pet. at 19-20. Consent, however, had nothing whatsoever to do with the holding in *PG&E*. The whole point of *PG&E*, as well as its predecessor, *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980), was to make clear that a private corporation does not waive its first amendment rights simply by virtue of its status as a regulated entity. *See PG&E*, 475 U.S. at 17 n.14. Generally, the state may not condition acceptance of state benefits on a private party's consent to a waiver of its constitutional rights. *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *Sherbert v. Verner*, 374 U.S. 398, 404-05 (1963); *Speiser v. Randall*, 357 U.S. 513, 519-20 (1958). This principle was extended to regulated utilities in *Consolidated Edison* and *PG&E*. Accordingly, the legal notice exception rests not on the utility's consent, but on the strength of the state's interests in providing notice of matters of public concern and on the minimum impact of such notices on the utility's own speech.

In this case, the substantial state interests concern both the substance of this litigation and the management of class action litigation. The plaintiffs allege that Mountain Bell has violated state laws designed to protect markets and consumers. Colorado has chosen to secure the enforcement of these laws through both public and private actions.[6]

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[6] With respect to the conduct at issue here, the Attorney General of Colorado filed, and subsequently settled, an action against petitioner. *State of Colorado v. Mountain States Co.*, Cause No. 87-CV-21225. The State Attorney General's action did not preclude this private litigation.

In addition to the substantive state interests at issue in this case, Colorado has a significant interest in the efficient management of its judicial resources through the class action procedure. As the Colorado Supreme Court recognized: "The basic purpose of a class action is to eliminate the need for repetitious filing of many separate lawsuits involving the interests of large numbers of persons and common issues of law or fact by providing a fair and economical method for disposing of a multiplicity of claims in one lawsuit." Pet. App. at 9a; *see also id.* at 17a. This Court has also recognized these same governmental interests in allowing class actions, which "from the plaintiffs' point of view [resemble] a 'quasi-administrative proceeding, conducted by the judge.'" *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (quoting 3B J. Moore & J. Kennedy, *Moore's Federal Practice* Para. 23.45[4.-5](1984)).[7]

Mountain Bell's facile attempt to distinguish legal notice of administrative proceedings from legal notice of court proceedings as the basis for circumventing the applicable exception set out in *PG&E* is both unsupportable and

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[7] Perhaps the best expression of the substantial state interest in the modern class action lawsuit was provided by Judge Weinstein, widely recognized as one of the nation's leading experts on civil procedure:

> The existence of class action litigation may also play a substantial role in bringing about more efficient administrative enforcement and in inducing legislative action.
>
> The matter touches on the issue of the credibility of our judicial system. Either we are committed to make reasonable efforts to provide a forum for adjudication of disputes involving all our citizens — including those . . . consumers who overpay for products because of antitrust violations . . . or we are not . . . .
>
> When the organization of a modern society, such as ours, affords the possibility of illegal behavior accompanied by widespread, diffuse consequences, some procedural means must exist to remedy — or at least to deter — that conduct.

N.Y. Law Journal, May 2, 1972 at 4, col. 3 (quoted in *Eisen v. Carlisle & Jacquelin*, 417 U.S. at 186 n.8 (opinion of Douglas, J.)).

untenable. Plainly, the state's interests in providing notice of class action litigation is at least as compelling as the state's interests in providing notice of regulatory matters.

2. The Business Disclosure Exception

In addition, the legal notice that Mountain Bell has been ordered to provide its customers can easily be understood as an "information disclosure requirement for [a] business corporation." *PG&E*, 475 U.S. at 15 n.12. The trial court's notice simply informs Mountain Bell's customers of the fact that a civil action has been filed against Mountain Bell and that the customers may want to take steps to protect their legal interests. The notice order is, in this sense, analogous to federal and state laws requiring corporations to disclose in a variety of business dealings the nature of lawsuits filed against them.[8]

Like the legal notice exception, the business information disclosure exception rests not only on the strength of the state's interests, but also on the relative weakness of the utility's interest in exclusion. The Colorado Supreme Court recognized this weakness when it stated that Mountain Bell's interests in the contents of the class notice "certainly can be no greater than the protection applicable to commercial speech." Pet. App. at 16a-17a. The Court reasoned that because a direct information disclosure requirement that attached to the underlying speech "involving a commercial transaction between the company and its customers," *id.*, would only have to meet a commercial speech

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[8] *See, e.g.*, 17 C.F.R. §§ 229.103, 240.14a-101 Item 14(b)(3)(C) (1987) (requiring corporations registering with SEC and soliciting proxies to describe pending legal proceedings, including the factual basis alleged to underlie the proceeding and the relief sought); C.R.S. § 11-51-109(2)(k)(1987) (requiring issuers to include in their registration statement "a description of any pending . . . proceeding to which the issuer is a party . . . ."); and § 303(b) Uniform Securities Act (incorporating this federal disclosure requirement for state offerings registered by coordination), adopted in 36 states and the District of Columbia.

standard, the notice required for adjudication of the legality of those transactions should not have to meet a higher standard.[9]

The effect of this conclusion was to distinguish this case, involving alleged violations of state laws designed to protect consumers and markets, from the sort of compelled speech involving either ideological affirmations, *see Wooley v. Maynard*, 430 U.S. 705 (1977); *West Virginia Bd. of Educ. v Barnette*, 319 U.S. 624 (1943), or the political speech of newspapers, *see Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), and similar publications. *See PG&E*, 475 U.S. at 5 (describing monthly newsletter). In none of these cases could the state-compelled speech be considered, or even analogized to, a business information disclosure requirement. Mountain Bell implicitly admits that the interests affected by this information disclosure requirement rise no higher than commercial speech when it elaborates the importance of the billing envelope to the "corporation-consumer relationship." Pet. at 29.

B. The Trial Court's Notice Order Satisfies the Due Process Requirements of Rule 23(c)(2) and Does Not Implicate the First Amendment Issues Decided in PG&E.

Not only does the trial court's notice come within the specific exceptions set out in *PG&E*, but the controverted judicial order has nothing in common with the commission action in that case. The critical points of *PG&E* were as follows: (1) the State intervened in a public debate in order to force a utility to support the speech of another private party; (2) the reason for this intervention was to advance a State policy that favored the speech interests of the private

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[9] Contrary to Mountain Bell's allegation, Pet. at 14, the Colorado Supreme Court did not characterize the legal notice itself as "commercial speech." *See* Pet. App. at 16a-17a. It used the commercial speech analysis only to appraise the strength of Mountain Bell's interest in the activity underlying the lawsuit.

party over the speech interests of the utility; and (3) the effect of the intervention was likely to be an alteration in the noncommercial speech of the utility, which would seek to avoid such burdens in the future and would be forced to respond to the controversial messages it was compelled to convey. On each of these critical points, the first amendment interests recognized in *PG&E* are not implicated by the trial court's notice order.

1. The Class Notice Mountain Bell is Required to Convey is the Speech of the Trial Court, Not of the Plaintiffs.

Mountain Bell's argument is premised upon the fundamental mischaracterization of the notice at issue here as the speech of the plaintiffs, rather than that of the trial court. Pet. at 21. Colo.R.Civ.P. 23(c)(2) states: "the *court* shall direct to the members of the class the best notice practicable under the circumstances . . ." (emphasis added). Consistent with this language, both Colorado courts which reviewed the particular notice at issue here held it to be the official speech of the court, not the private speech of a party. Pet. App. at 18a, 30a.

Under the Colorado procedural rules, the plaintiffs in a class action have no more control of the substantive content of the notice than does the defendant. In this case, both parties were entitled to, and received, exactly the same opportunity to advise the trial court of their recommendations regarding the content of the class notice. The trial court's notice objectively describes the claims, defenses and counterclaims and it describes each party's response to the claims made against it. The notice primarily consists of a description of the trial court's class action ruling, the options open to potential class members, and the rights and obligations of class members. *See* Pet. App. at 36a-38a. All of these matters are strictly functions of Colorado law and judicial practice, wholly independent of the character of either party's allegations and responses.

The plaintiffs are no more free to convey a message of their own choosing to potential class members through this notice than is Mountain Bell. Although the trial court is utilizing Mountain Bell's billing envelopes to transmit its class notice, the plaintiffs are not independently communicating with potential class members in that notice.[10]

2. Colo.R.Civ.P. 23(c) Does Not Express a Preference for Particular Speakers, But Rather Fulfills a Constitutional Obligation.

Colorado's strict control over the content and form of the class notice underscores the legal significance of providing adequate notice to potential class members. As recognized by the Colorado Supreme Court, "[t]he mandatory notice provisions of C.R.C.P. 23(c)(2) are designed to fulfill due process requirements to which the class action procedure is subject." Pet. App. at 13a. The constitutional right of class members to this notice creates a duty for the state — not for the plaintiff. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. at 812.[11] Because the state intends to adjudicate property interests of absent class members, it must provide them the

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[10] Issues relating to a party's communciations with class members have arisen in the courts, *see, e.g., Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193 (11th Cir. 1985), and this Court has considered the appropriatness, under the Federal Rules of Civil Procedure, of court-ordered restraints on that speech. *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981). The speech in these cases, however, differed dramatically from the legal notice at issue here because it was partisan advocacy of a party's position, unconstrained by prior judicial appraisal.

[11] *See also* 7B C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 1786 at 189 (1986) ("Without the notice requirement it would be constitutionally impermissible to give the judgment binding effect against the absentee members of the class.") The parallel federal Rule 23(c) was "designed to fulfill requirements of due process to which the class action procedure is of course subject." Notes of Advisory Committee on the 1966 amendment to Rule 23, set out after Rule 23 in 28 U.S.C.A. (at 57).

best practicable notice. *See Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314-15 (1950).

The constitutionally mandated notice at issue here cannot be considered even remotely a part of a public debate about controversial, noncommercial issues. Unlike the regulatory commission in *PG&E*, the trial court has not joined a public debate, let alone intervened on behalf of one party to such a debate. Rather, it has acted to meet its constitutional obligations. While a lawsuit may become the subject of a public debate — generating press reports, news conferences and even private, direct-mail campaigns — the legal notice to class members is not itself an element of that debate.

What the parties may choose to say about a lawsuit is a matter wholly different from what the state is required to say whenever it adjudicates the claims of absent parties. The court order in this case, therefore, does not reflect any policy choice on the part of the state to intervene in the public debate that may arise as a result of the filing of this lawsuit and the allegations that the parties have made. The state has merely recognized, and responded to, the constitutional right of every potential class member to be informed of the pendency of this lawsuit.

3. The Trial Court's Notice Order Neither Penalizes Nor Burdens Mountain Bell's Past or Future Speech.

The Court's holding in *PG&E* did not depend simply on the formal characterization of the commission's intervention in a public debate, but also on the likely consequences to the utility of that intervention. The commission's order constituted a penalty and a burden on the utility's expression of opinions on controversial, noncommercial subjects.

The trial court's notice order cannot reasonably be viewed as "penalizing" Mountain Bell's speech. Mountain Bell could not have avoided the mandated class notice by altering its noncommercial speech. It cannot hope to avoid

similar orders that may arise in future litigation by remaining silent on controversial issues.

Finally, the trial court's order lacks all of the burdensome features identified in *PG&E*. There, the private party was granted free access to the billing envelopes and the utility would have to absorb the costs. Here, the plaintiffs will bear the applicable costs. There, because the commission was trying to shape a long-term debate, the private party was granted periodic access to the billing envelopes. Here, the court order involves only a single occasion of access to the billing envelopes. There, the private party was free to convey any message it chose, creating an indefinite threat or problem for the utility. Here, the court completely controls the content of the message.

In sum, the trial court's order is not a penalty for past or future expresssion of views on controversial subjects and it imposes no burden on Mountain Bell.

## III. THERE-IS NO CONFLICT BETWEEN THE DECISION OF THE COLORADO SUPREME COURT AND THE DECISION OF ANY OTHER COURT.

The only other case addressing possible first amendment limitations on a trial court's authority to assign notice tasks to a class action defendant is *Sollenbarger*. There, the district court rejected Mountain Bell's interpretation of *PG&E* and required Mountain Bell to mail the court's notice to potential class members. Resp. App. at A-3 to A-7; *see Sollenbarger*, 121 F.R.D. at 436-37. Mountain Bell ignores this precedent and instead attempts to manufacture a conflict based on unrelated lower court decisions.

Mountain Bell contends that review is justified because of a conflict between the Colorado Supreme Court decision and *Central Illinois Light Co. v. Citizens Utility Bd.*, 827 F.2d 1169 (7th Cir. 1987). The Colorado Supreme Court properly understood *Central Illinois* to be a straightforward application of *PG&E*. Pet. App. at 21a n.6. Because Moun-

tain Bell's argument with respect to *PG&E* is unavailing. *Central Illinois* does not in any way strengthen its position.

*Central Illinois* involved a situation virtually identical to that in *PG&E*. Illinois had passed a statute that forced utilities to provide access to their billing envelopes to consumer groups. Just as in *PG&E*, the State forced the utility to provide access to third-party messages, based on the substantive character of the interests represented by the groups benefited. Also as in *PG&E*, access was to be provided at least four times a year and the utilities were to absorb the costs of the notice. While the Illinois statute seemed to limit the content of these messages to objectively neutral information, the court concluded that "[w]ithout exception, these enclosures have advocated positions contrary to those of the utilities." *Central Illinois*, 827 F.2d. at 1171 (citation omitted). Indeed, the court gave an example of one message that began as follows: "WARNING! This utility bill may be hazardous to your budget." *Id.* at n.2. Given these facts, the court correctly held the Illinois regulatory scheme to be "in all material respects, constitutionally indistinguishable" from the commission order struck down in *PG&E*. *Id.* at 1174.

Mountain Bell also suggests some general problem concerning the extent to which a court "can burden litigants' First Amendment rights in a class action proceeding." Pet. at 26. Except for the unsupported assertion that the trial court's order would have been rejected by the Fifth Circuit, under a standard that this Court specifically declined to consider, *see Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 n.15 (1981), Mountain Bell offers no other basis for review. The Fifth Circuit case upon which Mountain Bell relies involved a prior restraint of speech that was "both constitutionally protected and consistent with the purposes of the class action." *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 475 (5th Cir. 1980). Instead of restraining constitutionally protected speech, the trial court here is speaking to satisfy a constitutional requirement.

In the only other cases Mountain Bell cites which are even vaguely related to this issue, the courts held that district courts do have the authority, under appropriate circumstances, to issue orders restricting a party's ability to communicate with potential class members. *See In re School Asbestos Litig.*, 842 F.2d 671 (3d Cir. 1988); *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193 (11th Cir. 1985). Mountain Bell fails to identify any conflict or even any practical problem that would justify review of this case. This Court has already recognized that "in the conduct of a case, a court often finds it necessary to restrict the free expression of participants." *Gulf Oil*, 452 U.S. at 104 n.21.

## IV. THE RULE FOR WHICH MOUNTAIN BELL ARGUES WOULD IMPAIR JUDICIAL CONTROL OF THE LITIGATION PROCESS.

Acceptance of Mountain Bell's argument would have damaging consequences for judicial management of litigation. Recognition of a first amendment right to remain silent in the litigation context would not only complicate notice requirements, it would extend a constitutional impediment to discovery and other aspects of litigation.

While Mountain Bell attacks only the constitutionality of the requirement that it share in the responsibility for the constitutionally mandated notice, its first amendment argument cannot be so easily cabined. For example, if Mountain Bell has a right not to associate with the notice of the plaintiffs' claims, then presumably the plaintiffs can claim the same right not to associate with the notice of Mountain Bell's answer, affirmative defenses and counterclaim. Mountain Bell could also raise a similar first amendment objection if the trial court required it to provide a list of its customers to the plaintiffs. Conceptually, this would be just another form of compelled speech for the benefit of a party's adversaries. Similarly, an unsuccessful class action defendant is often required to reimburse the named plaintiffs for the cost of the notice. *See* 3B J. Moore & J. Kennedy, *Moore's*

*Federal Practice* Para. 23.55 n.29 (1987). Because Mountain Bell's first amendment claim cannot depend upon the outcome of the lawsuit, Mountain Bell could object to any such order shifting costs as an unconstitutional, compelled subsidy of an ideological opponent. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-36 (1977).

Furthermore, the likely consequences of this novel first amendment argument cannot be limited to issues arising out of legal notice requirements. Discovery would become virtually impossible if parties could claim a right not to speak when that speech might aid an ideological, political or economic opponent. Instead of relying on traditional rules of privilege, parties to litigation — and even witnesses — could invoke a first amendment right not to speak. In each case, Mountain Bell would have the courts weigh the strength of the state's interests and its ability to accomplish the same ends in some other way that does not intrude upon these alleged first amendment interests before the court could compel a recalcitrant party to speak. The adoption of Mountain Bell's unprecedented argument would impair the entire judicial process.

## CONCLUSION

The decision of the Colorado Supreme Court is fully consistent with this Court's decision in *PG&E* and it does not conflict with any lower court decision. Furthermore, Mountain Bell's argument would have untenable consequences for the conduct of litigation. Accordingly, the petition should be denied.

Respectfully submitted,

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## APPENDIX A

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

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|---|---|
| ROGER SOLLENBARGER, RALEIGH K. GARDENHIRE, CHARLES WHEELER AND PETER NAUMBURG, for themselves and all others similarly situated,<br>*Plaintiffs,*<br>vs.<br>MOUNTAIN STATES TELEPHONE AND TELEGRAPH CO., d/b/a U.S. WEST, a Colorado corporation,<br>*Defendant.* | CIVIL ACTION<br><br>NO. 87-1485-SC |

### ORDER

This matter comes before the court on defendant's motion, pursuant to Fed. R. Civ. P. 59(e), to alter the class certification order entered on August 15, 1988. Defendant's timely motion challenges the court's decision to allow plaintiffs' to disseminate notice to the class via defendant's monthly billing statement. Class Certification Order at 48. The court based its decision on *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 348 and n.22 (1978). *Id.* Defendant's argue a subsequent decision of the U.S. Supreme Court, *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 106 S.Ct. 903 (1986), bars the procedure outlined by this court for class notice on first amendment

grounds. The court considered the memoranda submitted by the parties and is prepared to rule.

The court must first confront plaintiffs' contention that defendant waived their constitutional argument. Plaintiffs assert they briefed the notice question on two occasions; defendant did not respond; and therefore, defendant waived the issue. Defendant argues that 1) the court granted it a future hearing on the notice issue at the June class certification hearing and 2) the notice issue was not ripe until after the court certified a class action. This court has often stressed the importance of the constitutional rights of all persons and entities and has strictly construed any claim of a waiver of a constitutional argument. While defendant's reading of the class certification hearing and its ripeness argument are strained interpretations, the court will consider the motion on the merits.

Defendant relies on *Pacific Gas* for the general proposition that no arm of government can force it to disseminate information it disagrees with consistent with the First Amendment of the Constitution. In *Pacific Gas*, the Court struck down a California Public Utilities Commission order that required the utility to allow a consumer group to use the "extra space" in Pacific gas' monthly bills four times a year at no charge. The "extra space" was the unused postal weight within the basic postage rate that remained after the Utility included its normal monthly bill. The Utility used the extra space for many years to distribute a newsletter. 106 S.Ct. 905-06. The Commission considered the extra space the property of consumers and believed that inclusion of information from a citizens' group would further the public interest. *Id.* at 906.

The Supreme Court struck the Commission's regulation because it "impermissibly burdens appellant's [Pacific Gas's] First Amendment rights because it forces appellant to associate with the views of other speakers, and because it selects the other speakers on the basis of their viewpoints." *Id.* at 914. A plurality of the Court first relied on several

forced association decisions. The Court invalidated rules in two cases which forced a party to associate with the views of another party with whom it did not agree. *Id.* at 908-09 (citing *Miami Herald Publishing Co. v Tornillo*, 418 U.S. 214 (1974) (political candidate's statutory right to reply to a negative editorial or article in newspaper) and *Wooley v. Maynard*, 430 U.S. 705 (1977) (first amendment allows car owner to cover slogan on license plate that he does not want to associate with).

Second, the plurality overturned the Commission's order because it favored those who opposed Pacific Gas at rate hearings. When the Commission determined who could use the extra space in the monthly billings, it excluded groups who favored Pacific Gas from consideration for forced access to the monthly bills. *Id.* at 910-11. While Pacific Gas could not isolate itself from a public debate about rates, the Court held "it *does* have the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents." *Id* at 911 (emphasis in original) (quoting *Buckley v. Valeo*, 424 U.S. 1, 49 and n.56 (1976)). After determining Pacific Gas' speech was impermissibly burdened by the Commission's order, the Court concluded the order was not a narrowly tailored means to further a compelling state interest, and it was not a valid time, place or manner regulation. *Id.* at 915-16.

Justice Marshall concurred in the *Pacific Gas* judgment based on two relevant distinctions of a prior case, *PruneYard Shopping Center v. Robbins*, 447 U.S. 74 (1980). *Id.* at 914, 915-16. *PruneYard* held that a shopping center owner could not use state trespass laws to stop a group from requesting shoppers to sign a political petition. 447 U.S. at 86-88. First, Marshall distinguished *PruneYard* on the degree of access historically available in the shopping center and in Pacific Gas' monthly bills:

> Were appellant [Pacific Gas] to use its billing envelope as a sort of community billboard, regularly carrying the messages of third parties, its

> desire to exclude a particular speaker would be deserving of lesser solicitude. As matters stand, however, appellant has issued no invitation to the general public to use its billing envelope, for speech or for any other purpose.

106 S.Ct. at 915. The second distinction noted by Marshall was the effect on the defendants' rights to express their own views. While the defendants in both cases did not want to associate with contrary views, they had different expressive interests. In *Pacific Gas*, the utility could not use its typical forum four times each year, while in *PruneYard*, the shopping center owner did not allege any inhibition of his speech. *Id.* at 916.

Defendant argues that *Pacific Gas* undercuts this court's reliance on *Oppenheimer Fund Inc. v. Sanders*, 437 U.S. 340 (1980). Class Certification Order at 48. The *Oppenheimer* decision explained when a district court could order a defendant to identify class members for notice purposes and when a defendant had to pay for a portion of the class notice process. *Id.* 355-56. In a discussion of district courts' powers under Fed. R. Civ. P. 23(d) to order defendants "to perform tasks other than identification that are necessary to sending class notice," the Court stated in a footnote:

> (A) number of courts have required defendants in Rule 23(b)(3) class actions to enclose class notices in their own periodic mailings to class members in order to reduce the expense of sending the notice, as respondents asked the District Court in this case to do.

*Id.* at 355 and n.22. This court relied on footnote 22 in drafting the pertinent part of the class certification order. Defendant contends this footnote is inapplicable after *Pacific Gas*. This court cannot concur.

First, the *Pacific Gas* plurality ruled that legal notices did not burden the speech of the utility. "The Commission's order is thus readily distinguishable from orders requiring

appellant to carry various legal notices, such as notices of upcoming Commission proceedings or of changes in the way rates are calculated." *Pacific Gas*, 106 S.Ct. at 911, n.12. A legal notice, such as a class action notice, does not implicate the concerns raised by the California order at issue in *Pacific Gas*. A class notice is generally made only once; the Commission order gave the consumer group four times each year to air its views. The order prevented the utility from expressing its views on any topic in the four monthly bills when the consumer group had access; the class notice in this case will have no restriction on defendant's right to speak. Defendant can use other parts of the unused portion of the monthly bill to comment on the suit, if they desire.

Second, the two distinctions Justice Marshall found distinguished *Pacific Gas* from *PruneYard* demonstrate that this situation is more like *PruneYard* and thus constitutional. Marshall was first concerned with the past opportunities third parties had to use the subject area for speech. 106 S.Ct. at 913. Unlike the utility in *Pacific Gas*, defendant sells space to as many as five persons each month. Class Certification Hearing at 86. As Marshall noted, a business publication which regularly carries messages of third parties deserves less solicitude when reviewing its claim to be free from forced association with certain views. *Id.*

Marshall's other concern was with any infringement on the rights of the owner of the forum to speak. In *Pacific Gas*, the utility could not speak four times per year when it historically would have; the shopping center owner in *PruneYard* merely did not want to associate with certain speech. *Id.* at 916. Defendant here is more like the shopping center owner; it has not alleged and could not that the class notice will prevent it from placing an insert in its bills concerning inside wire maintenance plans. The sole concern expressed in defendant's briefs is its desire to be free of any association with this suit. While the court understands defendant's perceived harm, this concern does not create a

constitutional impediment to sending class notice via defendant's monthly bills.

Plaintiffs moved the court in their response brief for sanctions against defendant, pursuant to 28 U.S.C. § 1927. Sanctions are appropriate under § 1927 when an attorney "multiplies the proceedings in any case unreasonably and vexatiously." *Id.* The Tenth Circuit recently stated sanctions were appropriate under § 1927 "for conduct, that, viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court." *Brailey v. Campbell,* 832 F.2d 1504, 1512 (10th Cir. 1987). The court does not believe defendant's counsel breached this standard. If defendant had raised its constitutional argument when plaintiffs discussed the class notice issue, this case may have proceeded a bit further. This is doubtful, however, because the substance of the class notice is still under review by counsel. Second, defendant's argument that class notice issues are not ripe until a class is certified has some force. Thus, while defendant's counsel may not have conducted the litigation in the most expeditious manner, their conduct did not violate 28 U.S.C. § 1927.

IT IS BY THE COURT THEREFORE ORDERED that defendant's motion for reconsideration is denied. IT IS FURTHER ORDERED that plaintiffs' motion for sanctions is denied.

At Wichita, Kansas, this 7th day of October, 1988.

/s/ FRANK G. THEIS
United States District Judge